

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER

v.

NRA POLITICAL VICTORY FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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19 pp

QUESTION PRESENTED

This brief addresses the following question:

Whether the Federal Election Commission has statutory authority to represent itself in this case in this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1151

FEDERAL ELECTION COMMISSION, PETITIONER

v.

NRA POLITICAL VICTORY FUND, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order of March 21, 1994, inviting the United States to address the question whether the Federal Election Commission has statutory authority to represent itself in this case in this Court. The United States has a substantial interest in the proper interpretation and application of 28 U.S.C. 518(a), which authorizes the Solicitor General to conduct Supreme Court litigation on behalf of the government, as well as in the proper interpretation of any statute vesting independent litigating authority in an agency of the United States.

STATEMENT

Petitioner Federal Election Commission (Commission or FEC) brought this civil enforcement action pursuant to 2 U.S.C. 437g(a)(6)(A). The FEC alleged that a transfer of funds from respondent National Rifle Association Institute for Legislative Action to its political action committee, respondent NRA Political Victory Fund, was a "contribution" prohibited by the Federal Election Campaign Act (FECA or Act), 2 U.S.C. 431 *et seq.* Pet. App. 2a-3a. The Commission sought declaratory and injunctive relief and civil penalties against the Institute for Legislative Action, the Political Victory Fund, and the Fund's treasurer, respondent Grant A. Wills. *Id.* at 3a.

Respondents contended that the statute establishing the Commission violates constitutional separation of powers principles in three respects. First, respondents argued that the Act impermissibly restricts the President's nomination power by requiring that no more than three (of the six) members of the Commission can be affiliated with the same political party. See 2 U.S.C. 437c(a)(1). Second, they asserted that the Commission's civil enforcement powers encroach on the President's authority to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3. Third, they contended that by placing the Secretary of the United States Senate and the Clerk of the United States House of Representatives on the Commission as *ex officio* members, see 2 U.S.C. 437c(a)(1), Congress has exceeded its authority under Article I. Pet. App. 6a. The district court rejected these arguments on standing grounds, concluding that respondents could not establish that they had been harmed by the alleged constitutional violations. *Id.* at 24a-27a. The district court agreed with the Commission on the merits of the enforcement action;

the court awarded declaratory and injunctive relief and assessed a financial penalty of \$40,000. *Id.* at 27a-28a, 29a-30a, 31a-34a, 35a.

The United States Court of Appeals for the District of Columbia Circuit reversed. Pet. App. 1a-18a. The court of appeals concluded that respondents had standing to raise two of their constitutional claims, *id.* at 6a-11a,¹ and held that the *ex officio* membership of the Secretary and the Clerk violated separation of powers principles. *Id.* at 13a-16a. The court concluded that the only conceivable purpose of *ex officio* membership was to influence the Commission, albeit solely through an informational or advisory role, and that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution." *Id.* at 15a (citing *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991)). The court determined that the offending portion of the FECA was severable, Pet. App. 16a-17a, but held that the *de facto* officer doctrine could not be used to redeem the Commission's actions in this particular enforcement proceeding. *Id.* at 17a-18a.

The Commission, in its own name, filed a timely petition for a writ of certiorari. The Commission neither sought nor obtained the authorization of the Solicitor General prior to filing its petition. Respondents filed a brief in opposition, and the Commission submitted a reply. By order dated March 21, 1994, this Court invited the United States to file a brief addressing the question "[w]hether the Federal Election Com-

¹ The panel concluded, however, that respondents' challenge to the statutory restrictions on party affiliation was not justiciable. Pet. App. 8a-11a.

mission has statutory authority to represent itself in this case in this Court."

DISCUSSION

In our view, the FEC lacks statutory authority to represent itself in this case in this Court. Pursuant to 28 U.S.C. 518(a) and implementing regulations, however, the Solicitor General has authorized the petition for a writ of certiorari filed by the Commission. The petition should therefore be considered by this Court.

1. The Federal Election Commission is an independent agency established by Congress to "administer, seek to obtain compliance with, and formulate policy" with respect to the Federal Election Campaign Act of 1971 (FECA), as amended, and chapters 95 and 96 of Title 26 of the United States Code. 2 U.S.C. 437c(b)(1). The Commission has "exclusive jurisdiction with respect to the civil enforcement of such provisions." *Ibid.*; see *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 485, 489 (1985); *FEC v. National Right to Work Comm.*, 459 U.S. 197, 198 n.2 (1982).

In addition to extensive recordkeeping, disclosure, investigative, rulemaking, and adjudicative functions, see 2 U.S.C. 437d(a), the Commission is vested with enforcement power that is "both direct and wide ranging" and substantially independent of the Attorney General and the Department of Justice. See *Buckley v. Valeo*, 424 U.S. 1, 111-113 (1976) (per curiam). If informal measures, see 2 U.S.C. 437g(a)(4), fail to prevent or correct violations of the FECA, the Commission is entitled to institute a civil action for injunctive or other appropriate relief. See 2 U.S.C. 437g(a)(6)(A). The Commission is also entitled to institute actions to implement or construe the provisions of chapter 95 of Title 26, which governs the administration of funds for Presi-

dential election campaigns and national party conventions, see 26 U.S.C. 9011(b); to implement the provisions of chapter 96 of Title 26, which governs the payment of matching funds for Presidential primary campaigns, see 26 U.S.C. 9040(c); and to seek repayment from Presidential candidates of funds that it determines are owed to the Secretary of the Treasury under chapter 95 or chapter 96. See 26 U.S.C. 9010(b), 9040(b). The decision whether to undertake these civil enforcement actions rests solely with the Commission.²

The Commission's independent litigating authority is described in two separate statutory provisions. The more general provision, 2 U.S.C. 437d(a)(6), applies to actions under both the Federal Election Campaign Act and chapters 95 and 96 of Title 26. It provides that

[t]he Commission has the power * * * to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of [the FECA] and chapter 95 and chapter 96 of title 26, through its general counsel.

The second provision, which appears in 26 U.S.C. 9010(d) and 9040(d), applies only to actions under chapters 95 and 96 of Title 26. It provides that:

² With regard to criminal enforcement, the Commission may refer to the Attorney General for possible prosecution any knowing and willful violation of the Act, or of chapter 95 or 96 of Title 26, if it has probable cause to believe that such a violation has occurred or is about to occur. 2 U.S.C. 437g(a)(5)(C). The Attorney General is then obliged to report to the Commission any action taken with respect to the apparent violation. 2 U.S.C. 437g(c).

[t]he Commission is authorized on behalf of the United States to appeal from, and to *petition the Supreme Court for certiorari to review*, judgments or decrees entered with respect to actions in which it appears pursuant to the authority provided in [26 U.S.C. 9010 or 9040]. (emphasis added)

The present civil enforcement action was brought pursuant to 2 U.S.C. 437g(a)(6)(A). In it the FEC sought to establish a violation of 2 U.S.C. 441b(a), a provision of the FECA. Under 2 U.S.C. 437d(a)(6), the Commission clearly possessed independent litigating authority to "initiate" and "appeal" this action. Although the conduct of litigation on behalf of the United States and its agencies is generally subject to the control of the Attorney General under 28 U.S.C. 516 and 519, the Commission's independent conduct of the litigation in the district court and the court of appeals was therefore proper because "authorized by law" within the meaning of those Sections.³ See *United States v. Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988).

2. The question in this case, however, concerns the conduct of litigation in the Supreme Court. As a general matter, 28 U.S.C. 518(a) provides that

[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested.

By regulation, the Attorney General has delegated her authority to the Solicitor General. See 28 C.F.R. 0.20.

³ Under Sections 516 and 519, the conduct of litigation on behalf of the United States and its agencies is subject to the control of the Attorney General "[e]xcept as otherwise authorized by law."

Thus, if a case is one "in which the United States is interested," 28 U.S.C. 518(a), "it must be conducted and argued in [the Supreme Court] by the Solicitor General or his designee." *Providence Journal*, 485 U.S. at 700; see also *United States v. Winston*, 170 U.S. 522, 524-525 (1898); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458 (1869).⁴

This case is plainly one in which the United States "is interested." In *Providence Journal*, this Court held that this phrase embraces even those cases involving the interests of the Judicial Branch, since at bottom "the three branches are but 'co-ordinate parts of one government.'" 485 U.S. at 701 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)). Nothing in this Court's decisions suggests that cases involving independent administrative agencies such as the Commission call for a different conclusion.

Congress may exempt a class of litigation "from the otherwise blanket coverage" of Section 518, but "any

⁴ The Solicitor General may authorize an independent agency to represent itself in this Court in a particular case even if that agency lacks independent statutory authority to proceed on its own behalf. See 28 C.F.R. 0.20(a); cf. *Providence Journal*, 485 U.S. at 698 (noting that the Solicitor General had declined to authorize the filing of a petition for certiorari). Indeed, the Solicitor General sometimes deems it appropriate to authorize federal agencies to file briefs in this Court on their own behalf asserting positions contrary to those of the United States. See, e.g., *Dirks v. Securities and Exchange Commission*, 463 U.S. 646, 648 n.* (1983) (Securities and Exchange Commission authorized by Solicitor General to file brief defending the judgment of the court of appeals, although Solicitor General filed a brief urging reversal); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 367 n.* (1973) (Federal Power Commission authorized by Solicitor General to file brief *amicus curiae* supporting position contrary to that asserted by the United States).

such alleged exception must be scrutinized and subjected to the ordinary tools of statutory construction to determine whether Congress intended to supersede § 518(a)." *Providence Journal*, 485 U.S. at 705 n.9. Alleged exceptions must also be measured against the traditional role of the Attorney General and the Solicitor General in controlling and conducting Supreme Court litigation on behalf of the United States and its agencies, a role that is critical to proper management of the vast amount of government litigation that may potentially be brought before this Court. See *id.* at 702 n.7, 706; *id.* at 709, 713-714 (Stevens, J., dissenting); cf. *The Gray Jacket*, 72 U.S. (5 Wall.) 370 (1866).⁵

Although the Commission has represented itself before this Court in the past,⁶ review of the

⁵ Statutory provisions conferring litigating authority on independent agencies vary substantially in their terms. On the one hand, before its expiration the Ethics in Government Act of 1978 authorized an independent counsel to initiate and conduct prosecutions "in any court of competent jurisdiction * * * in the name of the United States," 28 U.S.C. 594(a)(9)—a provision that this Court has characterized as "suggest[ing] [an] exception[] to the blanket coverage of § 518(a)." *Providence Journal*, 485 U.S. at 705 n.9. On the other hand, some agencies are expressly *denied* authority to litigate on their own behalf in this Court. See, e.g., 5 U.S.C. 7105(h) (Federal Labor Relations Authority may conduct litigation through its own attorneys "[e]xcept as provided in section 518 of title 28, relating to litigation before the Supreme Court").

⁶ Exclusive of cases brought under Title 26, see, e.g., *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985), the Commission has represented itself in seven cases resulting in decisions on the merits since *Buckley v. Valeo*, *supra*. The Commission was the petitioner in *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981), involving the application of 2 U.S.C. 441a(d)(3), and *FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982), which involved the interpretation of 2 U.S.C.

Commission's statutory powers reveals that it lacks independent litigating authority to represent itself in the Supreme Court in this type of action, and that any authority must therefore be delegated by the Solicitor General under 28 U.S.C. 518(a) and implementing regulations. By its terms, the Commission's independent authority under 2 U.S.C. 437d(a)(6) is limited to "initiat[ing]," "defend[ing]," and "appeal[ing] any civil action in the name of the Commission." No mention is made of authority to file a petition for a writ of certiorari or otherwise to conduct litigation before the Supreme Court without the authorization of the Solicitor General. On its face, therefore, Section 437d(a)(6) does not provide the requisite "clear and manifest" evidence of an intent to displace the Solicitor General's authority over Supreme Court litigation on behalf of the federal government. See *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (per curiam) (internal quotation marks and citations omitted).

The failure of Section 437d(a)(6) to provide the Commission with independent litigating authority in

441b(b)(4)(c). The Commission was the appellant in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), in which this Court found 2 U.S.C. 441b unconstitutional as applied. The Commission was the appellee in *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981), which upheld the constitutionality of certain campaign expenditure limitations imposed by 2 U.S.C. 431 *et seq.*, and *Bread Political Action Comm. v. FEC*, 455 U.S. 577 (1982), involving the application of 2 U.S.C. 437h(a). The Commission also participated as *amicus curiae* in *First National Bank v. Bellotti*, 435 U.S. 765 (1978), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). None of those decisions addresses the question of the Commission's litigating authority under 2 U.S.C. 437d(a)(6). We are aware of no Department of Justice communications authorizing the Commission to represent itself in the Supreme Court in those cases.

this Court is especially noteworthy in light of the fact that Congress explicitly provided just such independent authority to the Commission in actions concerning the financing of Presidential election campaigns brought under chapters 95 and 96 of Title 26. With respect to such actions, Congress provided that “[t]he Commission is authorized on behalf of the United States to appeal from, and to petition the Supreme Court for certiorari to review,” judgments or decrees. 26 U.S.C. 9010(d), 9040(d) (emphasis added).⁷ It is difficult to read these two provisions without concluding that Congress intended to restrict the Commission’s independent authority in this Court to the Presidential election controversies for which Supreme Court litigation authority was expressly conferred.

The significance of the omission of any reference to Supreme Court litigation in Section 437d(a)(6) is also highlighted by 2 U.S.C. 437g(a)(9). That Section describes the decisions of courts of appeals in actions (such as the instant case) brought under 2 U.S.C. 437g as final “subject to review by the Supreme Court of the United States upon certiorari or certification as

⁷ Section 9010(d) was first enacted in 1971. See Presidential Election Campaign Fund Act, Pub. L. No. 92-178, 85 Stat. 497, 569-570. The Federal Election Campaign Act Amendments of 1974 established the Federal Election Commission, see Pub. L. No. 93-443, § 208, 88 Stat. 1263, 1280, and enacted 2 U.S.C. 437d(a)(6), which governs the Commission’s general litigation authority. See 88 Stat. 1282-1283. That statute also transferred to the Commission the functions previously performed by the Comptroller General under 26 U.S.C. 9010, see 88 Stat. 1293, and added Section 9040 to Title 26. 88 Stat. 1302. Thus, Section 437d(a)(6)—which omits any reference to litigation in the Supreme Court—was part of the same legislation that amended 26 U.S.C. 9010 and added 26 U.S.C. 9040, both of which expressly authorize the Commission to file petitions for certiorari.

provided in section 1254 of title 28.” 2 U.S.C. 437g(a)(9). Section 437g(a)(9) thus shows Congress’s understanding that, in the ordinary course, this Court’s review of cases brought under Section 437g would be conducted through writs of certiorari or certification and not as appeals. In view of this understanding, as well as Congress’s explicit reference to certiorari in Presidential election but no other cases, the reference in Section 437d(a)(6) to the Commission’s right to “appeal any civil action in the name of the Commission” cannot sensibly be read as providing the Commission with the authority to petition for a writ of certiorari in all cases. See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993).⁸

⁸ The only pertinent legislative history of which we are aware is a statement made in June, 1973, by Assistant Attorney General Robert G. Dixon, Jr., in testimony before the Senate Committee on Rules and Administration regarding the provisions of S. 372, 93d Cong., 1st Sess. See *Federal Election Reform, 1973: Hearings Before the Subcomm. on Privileges [sic] and Elections and the Senate Comm. on Rules and Administration*, 93d Cong., 1st Sess. 219-226 (1973) [hereinafter *1973 Hearings*]; *id.* at 339-347 (memorandum supplementing testimony of Assistant Attorney General Dixon). S. 372, a predecessor version of the statute (ultimately enacted in 1974) that established the Commission, had been favorably reported by the Senate Committee on Commerce on May 22, 1973. See S. Rep. No. 170, 93d Cong., 1st Sess. Dixon’s testimony opposed the creation of independent Supreme Court litigating authority in the Commission. Purporting to quote from the bill, Dixon stated that S. 372 would authorize the Commission “to initiate through civil proceedings for injunctive relief and through presentation to Federal grand juries, prosecute, defend or appeal to any court in the name of the commission.” *1973 Hearings* at 225 (emphasis added). Dixon expressed the view that under this provision “the Commission’s litigating authority would extend to the Supreme Court.” *Id.* at 226. A Department of Justice memorandum supplementing Dixon’s testimony stated:

3. In concluding that the Commission lacks general independent statutory authority to conduct litigation in this Court, we do not intend to minimize the existence of significant policy arguments that may be thought to favor a grant of such authority. Congress's decision to create an independent Commission was prompted at least in part by its recognition of the highly politicized nature of election disputes and by its belief that the Department of Justice, headed by a Presidential appointee, might not enforce the Act with sufficient vigor against members of the President's political party. See, *e.g.*, 1973 Hearings

"[W]e assume that the authority 'to defend or appeal to any court' would extend to the Supreme Court." *Id.* at 346. Dixon asserted that "[t]his attempt to divest the Solicitor General of longstanding jurisdiction to handle Supreme Court litigation on behalf of the United States would be contrary to the best interests of both the Federal Government as a major litigant before the Supreme Court, we feel, and of the Court itself." *Id.* at 226. Dixon also submitted the written statement of Solicitor General Erwin N. Griswold regarding a separate legislative proposal; that statement emphasized the importance of the Solicitor General's control over government litigation in the Supreme Court. *Id.* at 318-326.

The phrase "to any court," however, did not in fact appear either in S. 372 as reported by the Commerce Committee or in the legislation ultimately enacted. S. 372 would have authorized the FEC "to initiate (through civil proceedings for injunctive relief and through presentations to Federal grand juries), prosecute, defend, or appeal any court action in the name of the Commission." S. Rep. No. 170, *supra*, at 35 (emphasis omitted); 1973 Hearings at 302-303 (emphasis omitted); 119 Cong. Rec. 26,616 (1973). The legislation ultimately enacted in 1974 retained much of this language, although it restricted the Commission's litigating authority to civil cases. Assistant Attorney General Dixon's statement makes clear that the Department of Justice attached special importance to the Solicitor General's control over Supreme Court litigation, and that it opposed legislation that would transfer such control to the Federal Election Commission.

at 177, 186; *Federal Election Campaign Act of 1973: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 70-71 (1973); 119 Cong. Rec. 26,610 (1973) (Senator Pastore); cf. *Buckley v. Valeo*, 424 U.S. at 134. Congress might reasonably conclude that the need to protect the FEC's enforcement processes from partisan influences warrants an exception to the Solicitor General's usual control over the government's Supreme Court litigation.⁹ To date, however, we do not believe that Congress has enacted such an exception into law.¹⁰

4. For the foregoing reasons, the Commission lacks independent authority to represent itself in this case in this Court. However, by letter dated May 26, 1994, the Solicitor General has authorized the petition filed by the Commission. We believe that this authorization permits the Commission to conduct this litigation on its own behalf in this Court. See 28 U.S.C. 518(a); *Winston*, 170 U.S. at 525. Cf. *Hogg v. United States*, 428 F.2d 274, 280

⁹ The fact that Congress chooses to make a particular agency generally independent of Presidential direction does not create a presumption that the agency has statutory authority to litigate in this Court on its own behalf. To the contrary, *Providence Journal* makes clear that the Solicitor General is presumptively entrusted with representing in this Court the interests of even those governmental entities (such as the Judicial Branch) that are indisputably shielded from Presidential control. Congress may reasonably determine, however, that the functioning of a particular agency will be unacceptably compromised if it is not permitted to exercise litigating authority in this Court independent of the Attorney General and Solicitor General.

¹⁰ Congress is currently considering a proposal that would explicitly provide the Commission with the authority to appear on its own behalf through its own counsel in any court, specifically extending to petitions for certiorari. H.R. 3, 103d Cong., 1st Sess., § 701, 139 Cong. Rec. H10,684 (daily ed. Nov. 22, 1993).

(6th Cir. 1970) (so long as notice of appeal was timely filed, Solicitor General could authorize the prosecution of an appeal after the expiration of the sixty-day period prescribed by Fed. R. App. P. 4), cert. denied, 401 U.S. 910 (1971).

CONCLUSION

The petition for a writ of certiorari filed by the Commission should be considered by this Court.

Respectfully submitted.

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